

Remarks

The January 12, 2005 Office Action rejected all claims under § 103. In view of the amendment above and arguments below, reconsideration is respectfully requested.

It is first noted that several amendments to claim 1 have been made to remove typographical errors. Further, other changes have been made so that references to alternative preferred embodiments have been removed, for greater clarity.

With respect to the § 103 rejections, these rejections are respectfully traversed to the extent that they would still be applied to the claims as now amended. In this regard:

(a) No specific art was cited in support of the rejection. M.P.E.P. § 2144.03 E prohibits this type of rejection: "It is never appropriate to rely solely on common knowledge in the art without evidentiary support in the record as the principal evidence upon which a rejection was based....".

(b) Even if the Office Action had listed some specific reference as a base piece of art (which it did not), and then tried to supplement that with an assertion of some feature being common knowledge, Applicants would still have objected. In this regard, Applicants would then have requested a substantiation of what purportedly supported the assertion of common knowledge, pursuant to M.P.E.P. § 2144.03 C.

It is particularly important in evaluating the purported pertinence of prior art items to know whether they are capable of providing linear delivery rates. Applicants are entitled to have the opportunity to evaluate each piece of purported prior art.

(c) Moreover, the Office Action appears to assume that the only limitation that distinguishes the art is the x/y ratio. However, this is inaccurate. There is an "and" after

item e of claim 1. Thus, six specific attributes are specified to distinguish the art. When combined, these have the effect of causing the resulting system to provide an essentially linear dispensing.

Thus, this is not a situation where the only limitation of significance is a single x/y ratio. Hence, the rejections are premised on a faulty assumption.

(d) Further, the Office Action appears to be placing nearly preclusive reliance on a purported general negative rule of patentability relating to mere changes in size. It is true that some of the case law developed with respect to patents prosecuted under the pre-1952 patent acts sought to generalize particular classes of situations where patentability was less likely. However, even with respect to those old cases, it was recognized that significant new results could overcome those presumptions/rules. The most famous case of this type involved size changes related to the Edison light bulb supporting patentability.

However, the per se/negative rule approach has now been strongly criticized by the Federal Circuit. See In re Ochiai, 37 U.S.P.Q.2d 1133 (Fed. Cir. 1995) ("But reliance on per se rules of obviousness is legally incorrect and must cease...").

Thus, even if this had been a case of a mere change in size (which it is not), it would have been inappropriate for the Office to try to apply a purported general negative rule of patentability, rather than analyzing the specifics of this particular situation. This is particularly of concern in a case such as this where there is the surprising result of an essentially linear delivery of the material being dispensed.

(e) With specific reference to the Office Action's comments regarding dependent claims 3 and 4, regardless of whether there are prior art devices for rendering volatile fragrances, air fresheners, insect control chemicals, and odor

abatement chemicals, those claims are dependent on claims 1 and 2. Thus, they to should be considered patentable.

Conclusion

In view of the above amendment and remarks, reconsideration and allowance of amended claims 1-4 is respectfully requested. No additional fee is believed necessary for the entry and consideration of this amendment. However, if one is, please charge the amount of the fee to Deposit Account 10-0849.

Respectfully submitted,

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